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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE L. CASTELLANOS,

Defendant and Appellant.

B236486

(Los Angeles County  
Super. Ct. No. BA380676)

APPEAL from a judgment of the Superior Court of Los Angeles County. Norm Shapiro, Judge. Reversed in part, sentence vacated and remanded with directions.

Linn Davis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Jose L. Castellanos appeals from the judgment entered following a jury trial in which he was convicted of second degree robbery with a finding that the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang. Defendant contends insufficient evidence supported the gang enhancement finding and the trial court gave an incorrect gang enhancement instruction. We conclude insufficient evidence supported the gang finding and reverse on this ground. We do not reach the instructional issue.

### **BACKGROUND**

On the evening of January 31, 2011, Salvador Figueroa rode his bicycle to the Family Arcade across the street from Los Angeles City College, locked the bicycle to a parking meter, and entered the arcade. When he later went outside to check on the bicycle, Figueroa was approached by co-defendant Oscar Ernesto Lopez, who asked how much the bicycle was worth and whether Figueroa wanted to sell it. Figueroa told Lopez the bicycle was inexpensive but he did not want to sell it because it was his only means of transportation. During this discussion, Figueroa noticed the letters “L” and “M” tattooed under Lopez’s eyes. From his knowledge of graffiti in the community, Figueroa inferred that Lopez was a member of the La Mirada Locos street gang (La Mirada Locos).

When Figueroa attempted to reenter the arcade, Lopez blocked him, insisted that Figueroa sell him the bicycle, and demanded the keys to the lock. At some point during the discussion defendant exited the arcade and approached Lopez and Figueroa. When Figueroa again attempted to reenter the arcade, defendant, holding something in his pocket that Figueroa took to be a gun, blocked him and instructed, “Take everything out of your pockets or your life.” Figueroa gave defendant and Lopez his cell phone and approximately \$2 in quarters, after which defendant and Lopez ran away. Figueroa went into the arcade and phoned the police.

When defendant and Lopez were arrested the police recovered approximately \$1.25 in quarters from defendant but no gun or cell phone. Both Lopez and defendant were admitted members of the La Mirada Locos gang.

Trial was by jury on one count of second degree robbery (Pen. Code, § 211),<sup>1</sup> which was alleged to have been committed “for the benefit of, at the direction of, and in association with a criminal street gang.” (§ 186.22, subd. (b)(1).)

At trial, the prosecution presented evidence regarding the robbery and called Officer Garrett Breegle of the Los Angeles Police Department as an expert witness. Breegle testified he had been a peace officer for over five years, had been assigned to the Rampart Division’s gang enforcement detail for approximately one and a half years, had undergone extensive training and worked with seasoned gang officers, and was “tasked with staying up to date on the gangs” in the area and “suppressing the criminal activity of the La Mirada Locos Gang.” He testified both defendant and Lopez had admitted to him on prior occasions that they were La Mirada Locos gang members. Breegle testified the La Mirada Locos was a Hispanic gang that comprised approximately 100 members and claimed as part of its territory the area surrounding the Family Arcade where the robbery occurred.

The prosecutor asked Officer Breegle, “La Mirada Locos, what are their primary criminal activities, something they do on a regular basis?”

Breegle responded: “Primary criminal activities of this particular gang are they will -- vandalisms or putting graffiti up on walls. They will also commit street robberies, and they also commit assault with deadly weapons, or batteries, beating people up, and they’ve also committed attempt homicide or attempt murders.”

The prosecutor asked, “What about possession of weapons?”

Breegle replied: “Possession of knives or handguns is also a common practice.”

Breegle further testified he had spoken with and investigated two La Mirada Locos gang members who were convicted in 2008 and 2011 of possession of a weapon in violation of section 12021 and robbery. The prosecutor offered into evidence, without objection by the defense, certified minute orders documenting the convictions.

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<sup>1</sup> Further undesignated statutory references are to the Penal Code.

The prosecutor then gave Officer Breegle a hypothetical scenario similar to the facts of the robbery in this case and asked whether in his opinion the robbery was committed for the benefit of the La Mirada Locos gang. Breegle opined that the crime would have benefitted the La Mirada Locos mainly because it would have caused fear in the community so that citizens would be reluctant to come forward with information regarding the gang and its criminal activities.

The jury convicted defendant of second degree robbery and found true the allegation that the offense had been committed to benefit a criminal street gang. The trial court sentenced defendant to state prison for the low term of two years for the robbery plus five years for the gang enhancement.

Defendant appealed.

### DISCUSSION

Defendant contends the evidence was insufficient to support the gang enhancement allegation because the prosecution failed to prove the primary activities element. We agree.

Penal Code section 186.22, subdivision (b),<sup>2</sup> provides a sentence enhancement for anyone convicted of a felony “committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.” Subdivision (f) of section 186.22 defines “criminal street gang” as “any ongoing organization, association, or group of three or more persons” that has “*as one of its primary activities* the commission of one or more” of 28 criminal acts enumerated in subdivision (e).<sup>3</sup> (Italics added.) Subdivision

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<sup>2</sup> Because the crime in this case took place in January 2011, we consider the version of section 186.22 then in effect. (Stats. 2010, c. 256, § 1.) All references to section 186.22 are to that version. Although section 186.22 was amended three times after January 2011, the pertinent provisions remain unchanged. (Stats. 2011, chs. 15, § 275; 39, § 6; 261, § 1.)

<sup>3</sup> Subdivision (f) of section 186.22 provides: “As used in this chapter, ‘criminal street gang’ means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one

(e) lists numerous crimes, including murder, assault with a deadly weapon, robbery, prohibited possession of a firearm, and felony vandalism. (§ 186.22, subd. (e).)

“The phrase ‘primary activities,’ as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes be one of the group’s ‘chief’ or ‘principal’ occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group’s members.” (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323 (*Sengpadychith*).) Both past conduct and the circumstances of the charged offense are relevant to establish a group’s primary activities. (*Ibid.*) “Sufficient proof of the gang’s primary activities might consist of evidence that the group’s members *consistently and repeatedly* have committed” one or more of the enumerated crimes. (*Id.* at p. 324.) “Also sufficient might be expert testimony, as occurred in [*People v. Gardeley* (1996)] 14 Cal.4th 605. There, a police gang expert testified that the gang of which defendant Gardeley had for nine years been a member was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies.” (*Ibid.*)

We review the whole record in the light most favorable to the judgment to decide whether the record discloses substantial evidence—evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the gang allegation true beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.)

To trigger the sentence-enhancement provision of section 186.22, the trier of fact must find one of the criminal street gang’s primary activities is the commission of one or more of the crimes listed in subdivision (e) of that section. (*People v. Sengpadychith*, *supra*, 26 Cal.4th at p. 322.) But here, the prosecutor did not ask Officer Breegle what the primary activities of the La Mirada Locos gang were. She asked him what the gang’s primary *criminal* activities were. And although Breegle thereafter recited a number of

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or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.”

crimes committed by the gang, he reaffirmed these constituted only the gang's "[p]rimary *criminal* activities," and said nothing about its primary activities overall. The record therefore discloses no evidence, much less substantial evidence, that the gang's primary activities included the commission of any crime. On this ground alone defendant's gang enhancement must be reversed.

Even were we to read the prosecutor's question—"what are their primary criminal activities"—as "what are their primary *activities*," and Officer Breegle's answer—" "[p]rimary criminal activities of this particular gang are"—as "primary *activities* of this particular gang are," Breegle's testimony still would not constitute substantial evidence that the La Mirada Locos gang's principal activities included any of the crimes listed in subdivision (e) of section 186.22. Breegle responded first that the gang committed "vandalisms or putting graffiti up on walls." But only *felony* vandalism is an enumerated offense under subdivision (e) of section 186.22. (§ 186.22, subd. (e)(20).) Writing graffiti might constitute felony vandalism when the amount of defacement is \$400 or more (§ 594, subd. (b)(1) & (b)(2)(A)), but Breegle gave no estimate as to the amount of defacement caused by the gang. His testimony was thus too general to conclude that the graffiti to which he referred would amount to felony vandalism.

Officer Breegle went on to testify the gang "will also commit" robberies, assaults, and attempted murder, and said possession of knives or handguns "is also a common practice." But he did not indicate those activities were the primary, main, principal, or chief activities of the gang, and gave no specifics as to the number of such acts, their frequency or the time period over which they occurred. This was insufficient to show the crimes were the group's chief or principal occupations. (*Sengpadychith, supra*, 26 Cal.4th at p. 323.) Breegle also testified the gang will commit "batteries, beating people up." Battery is not an offense enumerated in subdivision (e) of section 186.22.

In sum, Officer Breegle was never asked and did not testify what the La Mirada Locos gang's primary activities were. Even if testimony as to a gang's primary *criminal* activities could support a gang enhancement, it would not do so here because the only primary activity Breegle described was misdemeanor vandalism, which is not an

enumerated offense. The other activities he described were crimes the gang “also” or “commonly” committed, not necessarily crimes they committed consistently and repeatedly.

Moreover, Officer Breegle gave no foundation for his opinion. “California law permits a person with ‘special knowledge, skill, experience, training, or education’ in a particular field to qualify as an expert witness [citation] and to give testimony in the form of an opinion [citation]. Under Evidence Code section 801, expert opinion testimony is admissible only if the subject matter of the testimony is ‘sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.’ [Citation.] The subject matter of the culture and habits of criminal street gangs, of particular relevance here, meets this criterion. [Citations.] . . . [¶] Evidence Code section 801 limits expert opinion testimony to an opinion that is ‘[b]ased on matter . . . by or personally known to the witness or made known to [the witness] at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which [the expert] testimony relates . . . .’ [Citation.] [¶] . . . [¶] Expert testimony may . . . be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions. [Citations.] Of course, any material that forms the basis of an expert’s opinion testimony must be reliable. [Citation.] For ‘the law does not accord to the expert’s opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert’s opinion is no better than the facts on which it is based.’ [Citation.]” (*People v. Gardeley, supra*, 14 Cal.4th at pp. 616-619.) Here, Breegle gave no explanation how he arrived at his opinion that the La Mirada Locos gang committed the crimes he recited. Although he testified he was well trained, had access to many resources, and conducted personal investigations, he never stated that he relied on his training, resources or investigations in forming his opinion.

We conclude the testimony of Officer Breegle provided no basis from which the jury could reasonably find that the La Mirada Locos was a criminal street gang within the meaning of section 186.22

Neither did evidence of two prior crimes committed by members of the La Mirada Locos gang, or the fact of the instant crime, establish that the gang's primary activities included enumerated crimes. The evidence established only that four gang members committed three enumerated crimes from 2008 to 2011. It did not show that members of the gang committed listed offenses consistently and repeatedly.

Accordingly, we conclude that the prosecution failed to introduce sufficient evidence to prove the primary activities element, and therefore failed to prove that the La Mirada Locos was a criminal street gang within the scope of section 186.22, subdivision (f). We therefore need not address defendant's contention that the court gave an incorrect gang enhancement instruction.

Pursuant to federal double jeopardy principles, the section 186.22 allegation may not be retried. (See *People v. Seel* (2004) 34 Cal.4th 535, 546-547.)

### **DISPOSITION**

The gang enhancement finding is reversed, the sentence vacated, and the matter remanded for resentencing.

NOT TO BE PUBLISHED.

CHANAY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.